92-1810

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

I. HYEON SU, *et al.*,

Petitioners,

v.

M/V SOUTHERN ASTER, *et al.*,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Civil Appeal Nos. 90-35618, 90-35879, 91-35375

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit erred when it affirmed the judgment of the district court holding that an extraterritorial discharge of a seaman prohibits the application of the Seaman's Wage Act when the wrongful withholding of wages occurred while the seamen was on a foreign vessel in a harbor of the United States.

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioners

Plaintiffs Jo Seong Gu, Gim Yeong Ho, Bag Han Kil, Pyeon Yun Su, Son Chi Il, Park Sung Ok, Ka Chae Ho and Chu Chae Sok.

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Respondents

M/V Southern Aster, *in rem*, and Southern Aster Navigation, S.A., *in personam*.

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PROCEEDINGS IN THE CASE BELOW

The district court opinion in *Su v. Southern Aster* is reported at 767 F.Supp. 205 (D.Or. 1990). The court of appeal opinion was handed down on October 14, 1992, and is reported at 978 F.2d 462 (9th Cir. October 14, 1992); petition for rehearing denied on December 9, 1992.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Ninth Circuit, sought to be reviewed herein, was issued on October 14, 1992; application for rehearing was denied on December 9, 1992. The jurisdiction of this Honorable Court is predicated on 28 U.S.C. § 1254, Writs of Certiorari to the United States Courts of Appeals.

AUTHORITIES CONSIDERED

46 U.S.C. § 10313, in pertinent part (set forth in its entirety in the appendix), reads:

* * *

> "(e) After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. A demand may not be made before the expiration of 5 days from the beginning of the voyage, not more than once in 5 days, and not more than once in the same port on the same entry. If a master does not comply with this

subsection, the seaman is released from the agreement and is entitled to payment of all wages earned. Notwithstanding a release signed by a seaman under section 10312 of this title, a court having jurisdiction may set aside, for good cause shown, the release and take action that justice requires. This subsection does not apply to a fishing or whaling vessel or a yacht.

(f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.

(g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed . . .

* * *

(i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section."

STATEMENT OF THE CASE

The case was commenced originally as a claim in admiralty by Plaintiffs both individually and through their union, the Federation of Korean Seafarer's Union, to

recover unpaid wages, penalty wages and other damages for the crew of the M/V SOUTHERN ASTER. The Union has elected not to pursue review in this Court, and so now only the individual plaintiffs Jo Seong Gu, Gim Yeong Ho, Bag Han Kil, Pyeon Yun Su, Son Chi Il, Park Sung Ok, Ka Chae Ho and Chu Chae Sok are before the Court in this matter.

The named Defendants are the vessel M/V SOUTHERN ASTER, *in rem*, and the vessel's owner Southern Aster Navigation, S.A., *in personam*. For purposes of this application for review, the actual facts are not in dispute. Review in this case centers around the question of whether or not 46 U.S.C. § 10313 inures to the benefit of foreign seamen where the wrongful conduct complained of occurred while Plaintiffs were on board a foreign flag vessel in a harbor of the United States, and the seamen-Plaintiffs delayed in bringing their action until they had been discharged in a foreign port and returned to their home country. It is undisputed that Plaintiffs are domiciliaries of the Republic of Korea. It is further undisputed that the M/V SOUTHERN ASTER is a foreign flagged vessel, flying the flag of Panama, and it is owned by Southern Aster Navigation, S.A., a foreign corporation, not domiciled in the United States. Each Plaintiff joined the M/V SOUTHERN ASTER in a port of Japan and at that time executed shipping articles in accordance with the law of Panama, the flag of the vessel, and International Labor Convention No. 22. During the time of Plaintiffs' service on board the M/V SOUTHERN ASTER, the vessel traded exclusively between Japan and the United States, making eight separate voyages to the United States. During the entire time of Plaintiffs' service on

board the M/V SOUTHERN ASTER, they were not paid the wages in accordance with the shipping articles, but were paid at a lesser rate despite Plaintiffs' request for half wages each time the vessel called upon a United States port and full wages at the termination of each of those voyages. In order to receive any wages, Plaintiffs were required to sign two sets of portage bills or wage receipts monthly, one set falsely acknowledging receipt of the amount of wages due under the shipping articles, and the other reflecting the actual amount paid to each Plaintiff. This practice has been called "keeping double books."

Because of this wrongful withholding of wages by the owners and master of the M/V SOUTHERN ASTER, and as a result of international maritime law and American general maritime law principles, Plaintiffs brought an *in personam* action against the owner and also alleged that a maritime lien had arisen against the vessel. The M/V SOUTHERN ASTER was present in the United States, more particularly within the territorial jurisdiction of the district court, at the commencement of the action. The M/V SOUTHERN ASTER with seamen-Plaintiffs aboard entered U.S. ports on eight separate occasions; each and every time there was a wrongful withholding of wages in violation of 46 U.S.C. § 10313(e) and (f).

In addition to the action for wages and to enforce a maritime lien against the vessel M/V SOUTHERN ASTER, Plaintiffs brought tort claims. Defendants moved to dismiss Plaintiffs' claims under 46 U.S.C. § 10313 pursuant to F.R.C.P. Rule 12. That motion was granted by the district court and affirmed on appeal. Defendants' additional motion to dismiss the remaining claims under the

doctrine of *forum non conveniens* was also granted. Plaintiffs seek review of the motion to dismiss the claims under 46 U.S.C. § 10313, and the motion to dismiss for *forum non conveniens*.[1]

ARGUMENT IN FAVOR OF GRANTING PETITIONERS' APPLICATION FOR WRITS

Rule 10 of the Rules of the Supreme Court provides that one of the special and important reasons for granting a writ of certiorari to review a court of appeal decision is when a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter.

The Court of Appeals has created a direct conflict between the Ninth Circuit and the United States Court of Appeals for the Fourth Circuit in *Fitzgerald v. Liberian S/T Chryssi P. Goulandris*, 582 F.2d 312 (4th Cir. 1978), and *Heros v. Cockinos*, 177 F.2d 570 (4th Cir. 1949), when it held extraterritorial discharge renders the wage statute inapplicable. The Court of Appeals relied upon on dicta in *Monteiro v. Soceidad Maritima San Nicolas S.A.*, 280 F.2d 568 (2d Cir. 1960), but misconstrued Judge Friendly's holding and refused to follow the controlling opinions of

[1] No argument is made herein regarding the motion to dismiss for *forum non conveniens* of the additional claims brought along with the claims under 46 U.S.C. § 10313. This issue is merely preserved for reconsideration by the district court in the event of reversal as the wisdom of a *forum non conveniens* dismissal should be reconsidered by the district court if it must exercise jurisdiction over the wage claims.

the Fourth Circuit referenced above. The Ninth Circuit properly noted that district courts in both the Fifth and Ninth Circuits have reached contra results involving the same issue.

This decision substantially affects a rule of national application which affects uniformity of the maritime law. Because the decision of the panel conflicts with other circuits, it destroys the uniformity sought in the maritime law. See *Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990).

EXTRATERRITORIAL DISCHARGE

The trial court dismissed the plaintiffs' wage claims pursuant to a Rule 12(b)(6) motion to dismiss and, as such, was solely a ruling on a question of law. The trial court held, " . . . the statute clearly requires discharge in a U.S. port as a jurisdictional prerequisite." The Ninth Circuit affirmed holding that " . . . logic dictates that full wage provision should not apply to foreign seafarers discharged from foreign ships in foreign ports." Strangely, the Ninth Circuit's concluding paragraph in its portion of the opinion dealing with, "Foreign seafarers discharged in foreign ports" implies a different result:

> "It is also unclear what wrongful conduct the shipowners engaged in while in a United States port. The Act imposes harsh penalties only for specific, well-defined conduct: the wrongful withholding of wages. Until that occurs, the Act's protections are unavailable. *For those seamen discharged overseas, that prohibited*

> *conduct did not occur in a United States port.*" [Emphasis added.] 978 F.2d at 471-72.

Contrary to the Ninth Circuit's holding that the "prohibited conduct" of the wrongful withholding of wages did not occur in a United States port, the record unequivocally establishes that the M/V SOUTHERN ASTER was in U.S. ports on eight separate occasions with plaintiffs on board, and each and every time there was a wrongful withholding of wages in violation of 46 U.S.C. § 10313(e) and (f). The record further unequivocally establishes that these wrongful withholdings of wages were part of defendants' double bookkeeping scheme requiring plaintiffs to execute fake wage receipts for the wages to which they were entitled under the shipping articles. A 12(b)(6) motion to dismiss is determined on the face of the complaint, requires that any doubt as to factual allegations to reside in favor of the plaintiff, and the ruling is on a question of law. *Conley v. Gibson*, 355 U.S. 41 (1957).

A reading of the district court's opinion coupled with that of the Ninth Circuit gives the clear impression that the Ninth Circuit intends that the wage statute should not apply to foreign seamen discharged in a foreign port, even when the wrongful withholding of wages occurs in a United States port. This interpretation of the wage statute is incorrect and in conflict with numerous other circuit courts of appeal. The Ninth Circuit opinion holds that even if a foreign seaman makes a demand for one half wages under subsection (e), and the master refuses that demand, and even though the seaman is entitled to full wages under subsection (f) and penalty wages under subsection (g), the benefits of those subsections will all be

denied unless the plaintiff is additionally physically discharged in a United States port. As such, the Ninth Circuit's opinion attempts to graft upon the statutory language the requirement that the seaman obtain a discharge in the same U.S. port. There is no such language in the statute and the previous jurisprudential interpretation of subsection (e) and subsection (f) have been exactly to the contrary. Indeed, the present immigration law of the United States prohibits the discharge of foreign seamen in a U.S. port.[2]

This in fact was the exact holding of *Heros v. Cockinos*, 177 F.2d 570 (4th Cir. 1949); wherein the foreign plaintiff's discharge in Spain did not prevent the application of 46 U.S.C. § 599 nor 46 U.S.C. § 597 (46 U.S.C. § 596 and § 597 being incorporated in 46 U.S.C. § 10313; and 46 U.S.C. § 599 being incorporated in 46 U.S.C. § 10314). The plaintiffs were 11 Greek seamen who signed on a Greek vessel whose suit was dismissed by the district court for lack of jurisdiction because the Greek seamen "did not return with the vessel on the voyage which ended in the waters of the United States and were not present here when the suit was instituted." In reversing and holding there was

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[2] See 8 U.S.C. 1281, *et seq.*, specifically 8 U.S.C. 1286: "Discharge of alien crewmen; penalties

> It shall be unlawful for any person, including the owner, agent, consignee, charterer, master, or commanding officer of any vessel or aircraft, to pay off or discharge any alien crewman, except an alien lawfully admitted for permanent resident, employed on board a vessel or aircraft arriving in the United States without first having obtained the consent of the Attorney General . . . "

jurisdiction and that the wage statutes applied, the Fourth Circuit noted that deduction of advances had occurred in the United States and that the "vessel was in the waters of the United States at the time suit was instituted." The court therefore held that the provisions of both the anti-advance statute and the half wage statute were applicable to the seamen's claims.

Other courts have similarly not considered extraterritorial discharge to bar application of the Seaman's Wage Act:

In *Southern Cross S.S. Co. v. Firipis*, 285 F.2d 651 (4th Cir. 1960), cert. denied 365 U.S. 869, 81 S.Ct. 903, 5 L.Ed.2d 859, a Greek seaman brought suit against a Honduran flag vessel for personal injuries plus wages and penal wages. The court found that the unearned wages accrued prior to the ship having left Germany and the court held:

> "Under circumstances such as these, it has been expressly held that such past wages from a previous voyage, plus double wages, may be the subject of a suit in this country after the ship reaches an American port." (Citations omitted.) 285 F.2d at 659.

In *Arguelles v. U.S. Bulk Carriers*, 408 F.2d 1065 (2d Cir. 1969) at 1069-1070, affirmed 400 U.S. 351, 27 L.Ed.2d 456, 91 S.Ct. 409 (1971), the plaintiff was a Filipino citizen suing for wages and penal wages. He had been discharged in Saigon, South Vietnam. The penalty wage statute was applicable and the plaintiff was not required to utilize the provisions of the collective bargaining agreement prior to seeking his redress before the court.

In *The Sonderborg*, 47 F.2d 723 (4th Cir. 1931), cert. denied 284 U.S. 618, 81 S.Ct. 903, 5 L.Ed.2d 859, the court of appeals applied the wage statutes to seven foreign seamen (from Denmark, Holland, Germany, Sweden and Norway) against a Danish owned and flagged vessel and held that the seafarers were entitled to the benefit of the penal wage statutes. The seven foreign seafarers had been discharged in a foreign port (Halifax, Canada) for refusal to work, placed briefly in jail, and then brought back to the United States. The court clearly held the wage statute equally applicable to foreign and American seamen alike.

In *Escobar v. S.S. Washington Trader*, 640 F.2d 1063 (9th Cir. 1981), the plaintiff had been discharged in Manila and sought recovery for wages and penal wages pursuant to 46 U.S.C. § 596 and § 597. The court, in holding that the wages had been wrongfully withheld and a release wrongfully extracted from Escobar, stated:

> "Moreover, this withholding left Escobar, an illegal alien, stranded in the Philippines without funds. In short, these were the very circumstances that prompted congressional enactment of much of the protective legislation for seamen in Section 596 in particular." (Citations omitted.)

In *Fitzgerald v. Liberian S/T Chryssi P. Goulandris*, 582 F.2d 312 (4th Cir. 1978), the appellate court stated:

> "Plaintiff is correct in asserting that the district court was incorrect if it thought an extraterritorial discharge necessarily precluded the applicability of American wage statutes."

Recovery was denied only because no demand was made under 46 U.S.C. § 597 and no recovery was allowed under 46 U.S.C. § 596 because the seaman's discharge occurred by virtue of his death on the high seas and the court held

that death was not a discharge that would invoke the payment of wages within four (4) days.

In *Morewitz v. Andros Compania Maritima, S.A.*, 614 F.2d 379 (4th Cir. 1980), a Greek seaman was discharged by virtue of his death at sea near the Philippine Islands aboard the vessel Evgeniag, a vessel flying the Greek flag and owned by a Panamanian corporation. The widow brought suit for wrongful death and unpaid wages under 46 U.S.C. §§ 596, 597 and 599. Recovery was denied only because the widow had executed a release for all wages and the court found that her claim was not made in good faith. However, there was absolutely no question that if the claim had been in good faith, the penal statutes would have been applicable.

In *Henry v. S.S. Bermuda Star,* 863 F.2d 1225 (5th Cir. 1989), the plaintiffs were foreign seamen serving on a vessel that frequently called at U.S. ports. While the court's opinion is silent as to the place of discharge, the record of the proceeding reflects that some seamen were discharged in foreign ports, and none of the plaintiffs were in the United States at the time of filing suit.

In *Thomas v. S.S. Santa Mercedes,* 572 F.2d 1331 (9th Cir. 1978), the court did not address the nationality of the plaintiff who was discharged in a foreign country and held that the wage statute was applicable. Four years prior thereto, the Ninth Circuit had applied the penal wage statute to Mr. Escobar, an "illegal alien" who had been discharged in Manila. *Escobar v. S.S. Washington Trader, supra.* Additionally, it has always been clear in the Ninth Circuit that the penal wage statutes apply to Americans discharged in foreign ports as this was the exact holding in *Vincent v. United States,* 272 F. 889 (9th Cir. 1921). Mr. Vincent was discharged in

Manila where the voyage had terminated and the court found that he was entitled to repatriation to the United States along with wages and penalty wages. This also was the exact holding in both the Ninth Circuit and this Court in *American Foreign Steamship Co. v. Matise*, 488 F.2d 469 (9th Cir. 1974), rev. 423 U.S. 150, 46 L.Ed.2d 354, 96 S.Ct. 410 (1975). Both the Ninth Circuit and this Court held the wage statutes applicable to Mr. Matise who had been discharged in South Vietnam; this Court reversing only because it was of the opinion that the airline ticket purchased by the shipowner could be construed as wages and, as such, there was no withholding without sufficient cause.

The ancient concerns of the Congress and the Supreme Court, over the unfair competitive advantage for foreign shipowners, are not mere theoretical musings, nor are they obsolete. In fact, U.S. shipping interests are now suffering from just such a reality. Today U.S. vessels carry less tonnage (both export and import) than anytime in the history of this country, only 3.7% compared to 22.1% 40 years ago and 48.7% 70 years ago.[3] Today there are fewer than 15,000 jobs available for American seamen as opposed to over 168,000 just 45 years ago.[4] In the recent Persian Gulf War, nearly one half of all goods were carried on foreign flag vessels because of the shortage of

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[3] Annual Reports: U.S. Department of Treasury; Commissioner of Navigation and U.S. Department of Commerce.

[4] In the fiscal year 1989, average monthly United States seafaring employment consisted of 14,268 jobs. MARAD Annual Report, 1989, U.S. Department of Transportation, Maritime Administration.

American owned vessels.[5] It would give a foreign shipowner a substantial unfair competitive advantage to hold the United States wage statutes applicable to a United States flag vessel when it discharged a seaman in a foreign port in contravention of the statute and not hold the foreign operator liable to the same extent.

In the case now before this Court, there was not an illegal advance in U.S. waters. Instead, illegal deductions were made in the waters of the United States and illegal wrongful withholding of wages as well as the cheating and fraud alleged in the complaint herein all occurred in the waters of the United States on eight separate occasions.

Also, contrary to the inferences in the trial court's opinion and holding of the Ninth Circuit, the right need not be enforced immediately but is subject to the statute of limitations of claims for wages. The mere fact that Plaintiffs waited until their return to Korea to file suit and arrest the vessel M/V SOUTHERN ASTER in U.S. waters for the wrongful conduct occurred is irrelevant to the cause of action. There simply is no indication that the statute operates as a traffic signal blinking on and off each time the vessel entered United States waters with Plaintiffs aboard – and then turned off when Plaintiffs left the waters of the United States making crossing into international waters like crossing some magical trip line. Plaintiffs did bring suit against the owners while the

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[5] Statement for the Record, Vice Admiral Francis R. Donovan, USN, Commander, Military Sealift Command, House Armed Services Committee, Subcommittee on Seapower and Strategic and Critical Materials.

vessel was in United States waters for a cause of action that previously arose when Plaintiffs were on board the vessel when it was in U.S. waters. Plaintiffs' suit ensured *in rem* jurisdiction of the federal courts and that the forum in which they filed would exercise the mandatory jurisdiction of 46 U.S.C. § 10313. See *Abraham v. Universal Glow*, 681 F.2d 451 (5th Cir. 1982).

The provisions of 46 U.S.C. § 10314, formerly 46 U.S.C. § 599 are to the same effect. This statute prohibits the advance payment of wages. This Court held that this statute only prohibited advance payments in United States territorial waters, and advances paid in foreign countries, that are valid in accordance with the laws of that foreign country, do not trigger the application of § 599. *Sandberg v. McDonald*, 248 U.S. 185, 63 L.Ed. 200, 39 S.Ct. 84 (1918). However, when an illegal advance is made in the territorial waters of the United States, and the seamen subsequently discharged in foreign waters, the provisions of 46 U.S.C. § 599 apply, along with the other provisions of the wage statute, 46 U.S.C. §§ 596 and 597. *Heros v. Cockinos, supra*; Norris, *The Law of Seamen*, § 17:29.

It is clear that subsection (i) is a choice of law provision. The provisions of (i) require an analysis in light of the provisions of 46 U.S.C. § 10303(c) which provides: "Unless otherwise provided, this chapter does not apply to a foreign vessel." Clearly paragraph (i) excepts the provisions of § 10313 from this choice of law provision; and the jurisprudence recognizes the statutory requirement of the application of American law, in particular this American law, to foreign vessels while in harbors of the United States. See *Strathearn S.S. Co. v. Dillon*, 252 U.S.

348, 40 S.Ct. 350, 64 L.Ed. 607 (1920); and *Abraham v. Universal Glow, supra*. A similar provision is found in the anti-advance statute, 46 U.S.C. § 10314, making it applicable to illegal advances made to seamen on foreign vessels in U.S. waters.

The cases of *Lauritzen v. Larsen*, 345 U.S. 571 (1953), and *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970), provide the choice of law factors to be considered in analyzing the applicability of the Jones Act and American maritime laws, generally, to foreigners under enunciated principles of choice of law analysis. *McCulloch v. Sociedad Nacional Marineros de Honduras*, 372 U.S. 10 (1963), reaffirmed the importance of the law of the flag of the vessel to matters of internal management. *McCulloch* also stands for the proposition that wages and employment conditions are generally governed not by American law, but instead by the law of the flag of the vessel. Paragraph (i) then is a mandate by Congress to assure that the ordinary choice of law provisions applicable in federal maritime cases are not applied to undercut the equalization principles between domestic and foreign shipowners which motivated the statute.[6] Paragraph (i) is a choice of law provision in the statute and it was error for the court to

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[6] Due process concerns dictate some connection with the United States. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); and this is met by the request that the wages be withheld while the seaman was on a vessel in a port of the United States. Any construction to the contrary would effectively emasculate the statute as it applies to foreign seamen, leaving their protection to the mere caprice of the port of discharge. Foreign shipowners, aware of such a technicality, would no doubt adjust their practices accordingly.

determine that failure to discharge seamen-Plaintiffs in a port of the United States resulted in the failure of the Plaintiffs to state a claim under the provisions of F.R.C.P., Rule 12(b)(6).[7]

The ability of Congress to statutorily require the application of American law to foreign vessels and entities is a matter which has been well settled. *Strathearn S/S Co. v. Dillon, supra,* and *Patterson v. Bark Eudora,* 190 U.S. 169 (1903). Inasmuch as the statute has been determined both by the Supreme Court and by the express language of Congress to apply to foreign seamen regardless, a choice of law analysis under 46 U.S.C. § 10313 would be both inappropriate and imprudent. The only choice of law or application of foreign law that is required under an action under 46 U.S.C. § 10313 is determining what wages are actually due under the law of the flag of the vessel and its shipping articles in order that American law (46 U.S.C. § 10313) may be properly applied. *Monteiro v. Sociedad Mar. San Nicholas,* 280 F.2d 568 (2d Cir. 1960); *Henry v. S.S. Bermuda Star,* 863 F.2d 1225 (5th Cir. 1989).

Wage cases have always been subject to the admiralty jurisdiction of the court, or on the law side of the court, or in state court pursuant to the savings-to-suitors clause. The trial court was obviously confused by Plaintiffs' position. The trial court opinion provided:

> "Plaintiffs argue that Section 10313 applies to foreign seamen who work or worked aboard

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[7] The only requirement for mandatory jurisdiction under 46 U.S.C. § 10313 is that it be brought in good faith. *Mihalinos v. Liberian S.S. Trikala,* 1972 AMC 726 (C.D.Cal. 1972), and cases cited therein.

> foreign vessels, and who were discharged at any port in the world on the basis of a subsequent entry into the U.S. port. Plaintiffs contend that the vessel need only have been in the U.S. harbor at some point in time with the plaintiffs seamen on board for the penalty wage statute to apply to their claims." (R.E. p. 40)

Plaintiffs submit to this Court that 46 U.S.C. § 10313 is only applicable if the wrongful withholding was made while a foreign seaman was on a vessel in a harbor of the United States, regardless of whether the wrongful withholding was made either under subsection (e) or subsection (f). If the wrongful withholdings were made in a foreign port, then 46 U.S.C. § 10313 would not be applicable just as this Court held advances illegal under United States law that are made in foreign ports are not covered by the wage statute. *Sandberg v. McDonald, supra.* If, however, a wrongful withholding of wages occurs in United States waters while the seaman is on that vessel, and he is subsequently discharged overseas, the plain language of the statute governs and the vessel may be arrested upon a subsequent entry to the United States. This is exactly what happened in the numerous cases cited by Petitioners. It is respectfully submitted that this Honorable Court should reverse the error made herein, and remand this matter with instructions to reinstate Plaintiffs' claims under 46 U.S.C. § 10313.

CONCLUSION

The requirement of the Ninth Circuit that the seamen be discharged in a port of the United States for the application of Seaman's Wage Act is clearly wrong. It is in complete conflict with previous jurisprudence and creates an impossible situation inasmuch as a foreign seaman is prohibited from being discharged in the United States, by virtue of the United States immigration law, 8 U.S.C. 1286. It is respectfully submitted that this Court should reverse the opinion of the Ninth Circuit Court of Appeal and remand the case with instructions that plaintiffs' cause of action be reinstated.

Dated this 5th day of February, 1993.

Respectfully submitted:

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I. Hyeon SU; Seong Gu, et al.; Gim Yeong Ho; Park Min Ho, et al.; Barg Yeong Pal; Seo Jeom Tae; Lee Sil Gwang; Jung Ju Goang; Ji Je Je; O Han Seon; Son Chi Il; Choi Weon Il; Chu Chae Sok; Kig Og Nam; Han Bag Kil; Pyeon Yun Su; Park Sung Ok; Ka Chae Ho; Federated Korean Seamen's Union, et al., Plaintiffs-Appellants,

v.

M/V SOUTHERN ASTER; Southern Aster Navigation, S.A., Defendants-Appellees.

Edwin A. JOSE, Plaintiff,

and

Perfecto C. Lim; Buen B. Esclamado; Crescencio I. Napao; Tomas N. Rosles Je; Hermiles S. Pinoon, Applicants in intervention-Appellants,

v.

M/V FIR GROVE; Delica Shipping, S.A.; Inui Steamship Co., Ltd. Defendants-Appellees.

Nelson R. RABY; Teofanis F. Roz; Apolonio H. Torreliza; Associated Marine Officers & Seaman's Union of the Philippines; S. Galua; Boifacio C. Tabada, et al.; Leo C. Ajero; Teodulo R. Rabie; Marcelo G. Suarez; Miguelito A. Cabales, et al., Plaintiffs-Appellees,

v.

M/V PINE FOREST; Delica Shipping, S.A.; Inui Steamship Co., Ltd., Defendants-Appellants.

Nos. 90-35485, 90-35486, 90-35706, 90-35618, 90-35879, 91-35375.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 17, 1992.

Decided Oct. 14, 1992.

Richard J. Dodson, Baton Rouge, La., John W. Buehler, Bullivant, Houser, Bailey, Pendergrass & Hoffman, Seattle, Wash., Robert M. Weinberg, Virginia A. Seitz, John West, Bredhoff & Kaiser, Jeremiah H. Collins, Susan D. Carle, Washington, D.C., I. Franklin Hunsaker, for plaintiffs.

Robert I. Sanders, Wood, Tatum Wonacott & Landis, Joe D. Bailey, Kathleen A. McKeon, Portland, Or., Joseph S. Stacy, Le Gros, Buchanan, Paul & Whitehead, William R. Bishin, Seattle, Wash., Kim Jeffries, Portland, Or., for defendants.

Appeal from the United States District Court for the District of Oregon.

Appeal from United States District Court for the Western District of Washington.

Before: WRIGHT, BEEZER, and LEAVY, Circuit Judges.

EUGENE A. WRIGHT, Senior Circuit Judge.

These consolidated cases test the bounds of the Seamen's Wage Act, 46 U.S.C. § 10313 (1988). The Wage Act protects seafarers from the efforts of unscrupulous shipowners to take advantage of their superior economic position to withhold payment of promised wages. Each case requires us to resolve this question: Do the Wage

Act's protections extend to foreign crews discharged from foreign ships in foreign ports? Although Congress likely could have extended the Wage Act this far, we conclude that it did not. The structure, history and, more important, the plain language of the Act all point to this result. Congress must speak clearly to overcome the strong presumption against extraterritorial application of United States law, and this it has not done.

I

Seamen from three Japanese log-carrying ships (the PINE FOREST, FIR GROVE and SOUTHERN ASTER) insist that they were systematically underpaid. The shipowners concede that they paid less than union wages, but say the crew agreed to the lower wages and further agreed to help the shipowners mislead union inspectors intent on uncovering such underpayments.

Underlying the men's claims is an ongoing dispute between shipowners and the International Transport Workers Federation, an umbrella labor organization of affiliated seafarers' unions. The unions seek to maintain worldwide wage rates that far exceed what seafarers from undeveloped countries demand.

The shipowners cannot merely ignore the unions, however, for if the owners fail to pay the union rate, the unions will sometimes interfere with the loading or unloading of the ships. To avoid this, the shipowners must demonstrate compliance with union rules and, in return, the unions award the ships protection in the form of a "Blue Certificate". By showing a Blue Certificate,

ships can forestall union hostility while in port. Shipowners have devised a scheme to obtain Blue Certificates without paying union wages. They keep two sets of books on each ship. One set records the actual wages paid and the other records union scale wages. Seamen memorize the union scale and the ships' masters instruct the crew to lie to union inspectors, telling them that the crew are receiving full union wages.

In the ship's articles, only the union wages are recorded. When the men are paid, they sign two receipts: one records the actual wages and the other shows union wages. This so-called "double-bookkeeping" scheme was used in an effort to deceive the unions on all three ships in this consolidated appeal.

A. The PINE FOREST

The PINE FOREST flew the flag of the Republic of Vanuatu,[1] was operated by a Japanese firm, and was owned by a Panamanian corporation which in turn was beneficially owned by Japanese citizens and companies. It carries logs from the United States to Japan; from Japan to the United States it carries only seawater as ballast.

The PINE FOREST entered service in March 1989 with a crew of nineteen Filipino seafarers. Two others joined the ship later. The men signed 12-month contracts

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[1] Apparently, the Republic of Vanuatu is to shipowners what Delaware is to coporate executives. Vanuatu is well-known for its unintrusive admiralty law. Despite its small size, it has about 400 registered merchant vessels. Paul K. Chapman, *Trouble on Board* 99 (1992).

in the Philippines, were told what they would be paid, and joined the ship in Japan. Each man signed the PINE FOREST's shipping articles, which recited that it abided by the union collective bargaining agreement specifying wages that far exceeded what they had been promised in the Philippines. Each was told, however, that he would in fact receive the lower wages originally promised and that he would be expected to help the shipowners deceive the union.

From March 1989 until the end of January 1990, the PINE FOREST sailed back and forth between Japan and the United States, completing eight trips. At each month end, the crew members received their wages and signed receipts for their actual wages and the higher union wages.

The scheme fell apart while the PINE FOREST was in port in Tacoma. On January 30, 1990, eleven of the crew members filed a complaint demanding full union wages. Their attorneys had the vessel arrested. Shortly thereafter, two other crew members signed the complaint. The union later added the remaining eight seafarers to the complaint, but these eight never signed or verified it.

The thirteen who signed the complaint left the PINE FOREST on February 8, after their replacements arrived. In their seamen's books, which they must take to each new vessel, the master recorded the reason for discharge. "Requested repatriation upon filing wages claim to arrest vessel." The other eight crew members remained aboard the PINE FOREST, completed their year of service, and left the vessel in Japan.

On February 13, the shipowners tendered $267,586 as the amount due the thirteen crew members who had left the ship. The seafarers divided and accepted this payment but later contended it was insufficient. The court set bond at $19,000,000, which the shipowners posted to release the vessel.

At trial, the plaintiffs succeeded on both statutory and maritime tort claims. The court awarded the seafarers $32,657,536, divided as follows:

Thirteen plaintiffs discharged in United States:

1.	Back Wages	23,696
2.	Statutory Penalties	4,191,671
3.	Loss of Future Income	6,800,470
4.	Emotional Distress	1,300,000
5.	Punitive Damages	13,000,000

Eight plaintiffs discharged overseas:

1.	Back Wages	142,236
2.	Statutory Penalties	2,799,463
3.	Loss of Future Income	0
4.	Emotional Distress	400,000
5.	Punitive Damages	4,000,000

The court also awarded attorneys' fees, relying on *Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962).

B. The SOUTHERN ASTER

The SOUTHERN ASTER, like the PINE FOREST, was a Japanese-owned log-carrier that transported United States logs to Japan. The crew was Korean rather than Filipino, and were represented by the Korean affiliate of the International Transport Workers Federation.

The crew joined the ship in Japan in March 1988, worked for about a year, then disembarked in Japan. During that year, the SOUTHERN ASTER made eight trips to the United States. It operated the same double-bookkeeping scheme as the PINE FOREST, paying the crew a lower wage than the union rate contained in the ship's articles.

On February 21, 1990, plaintiffs' attorneys had the SOUTHERN ASTER arrested in Coos Bay, Oregon, after filing a complaint for back wages on behalf of the absent crew. The district court set bond, which the shipowners posted to release the vessel.

The district court dismissed the case, granting the shipowners' 12(b)(6) motion on the statutory claims and dismissing the remaining claims on the ground of *forum non conveniens*. The court was not persuaded that the statute applied to foreign seafarers discharged in foreign ports from foreign-owned and flagged vessels. The shipowners agreed to submit to the jurisdiction of a Korean court as a condition of dismissal.

C. The FIR GROVE

The FIR GROVE was a sister ship of the PINE FOREST. It too employed a Filipino crew, flew the Vanuatu flag, and was beneficially owned by the Japanese.

In January 1989, the crew joined the FIR GROVE in Japan. They had been recruited in the Philippines and had agreed to a 12-month term of service. Over the next year, the FIR GROVE completed six trips between Japan and the West Coast, carrying logs to Japan and carrying ballast on the return trip. On these trips, the shipowners maintained the same double-bookkeeping scheme as on the PINE FOREST.

On the seventh trip, twelve crew members had the ship arrested in Coos Bay after filing a complaint for back wages, totalling about $300,000. Two other crew members later joined the complaint. The shipowners paid the back wages under a reservation of rights, and posted a bond to release the FIR GROVE. These fourteen seamen were discharged in Oregon.

Counsel moved for leave to file an amended complaint adding five more crew members who had not verified or signed the complaint and who had not been discharged in Coos Bay. These five stayed on the vessel, completed their year's obligation, and left the ship in Japan.

The court denied the motion, but allowed the five to apply for intervention. They did but the court refused their application, reasoning that their statutory claims were barred because they had been discharged in a foreign port. These five appeal the judgment denying their motion to intervene.

II

The Seamen's Wage Act, 46 U.S.C. § 10313, protects seafarers by ensuring they receive timely payment of

wages. The Wage Act's full wage provision requires prompt payment of wages at the completion of a voyage:

> At the end of a voyage, the master shall pay each seafarer the balance of wages due the seafarer within 24 hours after the cargo has been discharged or within 4 days after the seafarer is discharged, whichever is earlier. . . . When payment is not [timely] made . . . without sufficient cause, the master or owner shall pay to the seafarer 2 days' wages for each day payment is delayed.

46 U.S.C. §§ 10313(f), (g). Necessary to recovery under this provision is a showing that (1) the voyage ended, (2) either the cargo or the seafarer has been discharged, and (3) payment was withheld without sufficient cause.

The Wage Act's half-wage provision also covers partial payments each time a ship stops in port to load or unload cargo:

> After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. . . . If a master [fails to pay], the seaman is released from the agreement and is entitled to payment of all wages earned.

46 U.S.C. § 10313(e). The seaman must show that the master refused the man's demand for half-wages. Once the master refuses to pay, full wages become due, and if not paid, the seafarer may be entitled to double wages for each day's delay. *In re Williams*, 139 F.2d 262, 263 (4th Cir.1943).

The Wage Act also has an important jurisdictional provision, extending the Act's protections to seafarers on foreign ships when in a United States harbor:

> This section applies to a seafarer on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

46 U.S.C. § 10313(i).

A. Underpayment

The seafarers bear the burden of showing that the shipowners paid less than the full amount of wages due. The shipowners half-heartedly contend that the seafarers have no claim because they received the wages promised by the manning agency. The owners suggest that the higher rate shown in the shipping articles does not govern the seafarers' wages, because the men knew they would never be paid that amount.

It is well-established, however, that the shipping articles govern the contract of employment between the seamen and the master, and parol evidence to vary the terms of the articles is permitted only to show that the articles were fraudulently changed by the seafarers. *See* Martin J. Norris, *The Law of Seamen* §§ 6:1, 6:31 (4th ed.1985); *Northwestern S.S. Co. v. Turtle*, 162 F. 256, 258 (9th Cir.1908). In short, once the shipowners executed the shipping articles in furtherance of the double-bookkeeping scheme, they were bound to pay the rate recorded in the articles rather than the lower rate promised before the voyage.

B. Foreign seafarers discharged in United States ports

The Wage Act's jurisdictional provision makes clear that foreign seafarers discharged in an American port may invoke the Act's protections. The issue for these men is not whether they are entitled to seek back wages under the Act, but rather when the Act's protections were triggered and, based on that determination, what if any statutory penalties are due.

The PINE FOREST court awarded the 13 seafarers discharged in the United States over $4,000,000 in statutory penalty wages, finding that the Wage Act's protections were triggered each time it reached port. It reasoned that each leg of the trip was a voyage and the seawater ballast qualified as cargo.

1. Ballast as cargo

To trigger the protections of the Wage Act's full wage provision, the seafarers must show they were not timely paid at the end of their voyage. Timely payment under the statute means payment within 24 hours of discharging the ship's cargo or within four days of the seafarer's discharge, whichever is earlier. The definition of "cargo" under the statute is important for, assuming each trip from Japan to the United States constituted a voyage, if the seawater carried as ballast on those trips qualifies as "cargo," penalties started accruing at the end of each trip.

The Act leaves the term "cargo" undefined. No court has answered the question whether seawater ballast is

cargo under the Act. Precedent from other contexts, common definitions and common sense, however, suggest that seawater ballast is not cargo.

Black's defines *ballast* as "[t]hat which is used for trimming a ship to bring it down to a draft of water proper and safe for sailing." *Black's Law Dictionary* 181 (4th ed. 1951). *Cargo*, on the other hand, is

> [t]he load or lading of a vessel; the goods, merchandise, or whatever is conveyed in a ship or other merchant vessel. While "cargo" is primarily the load of the ship, it may have a varying meaning. The term may be applied in such a sense as to include passengers, as well as freight, but in a technical sense it designates goods only.

Id. at 268 (citations omitted). Non-law dictionaries similarly distinguish the two, defining ballast as "[a]ny heavy material placed in the hold of a ship . . . to enhance stability", and cargo as "[t]he freight carried by a ship. . . . " *See, e.g., American Heritage Dictionary* 102, 204 (1976). Freight is defined as "[g]oods carried by a vessel or vehicle; lading." *Id.* at 525.

Courts have also treated the two as distinct. Many have noted, for example, that ships carrying ballast are "without cargo". *See The Pedro*, 175 U.S. 354, 381, 20 S.Ct., 138, 148, 44 L.Ed. 195 (1899), *rev'd on other grounds, The Buena Ventura v. United States*, 175 U.S. 384, 20 S.Ct. 148, 44 L.Ed 206 (1899); *United States v. Alvarez-Mena*, 765 F.2d 1259, 1261 (5th Cir. 1985); *Pacific Far East Line v. United States*, 394 F.2d 990, 994, 184 Ct.Cl. 169 (1968); *Oliver J. Olsen & Co. v. Luckenbach S.S. Co.*, 279 F.2d 662, 672 (9th Cir.) *cert. denied*, 364 U.S. 881, 81 S.Ct. 171, 5 L.Ed.2d 103

(1960); *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F.Supp. 73, 73 (S.D.N.Y.1986), *rev'd on other grounds*, 830 F.2d 421 (2d Cir.1987), *rev'd*, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989); *McGhee v. United States*, 75 F.Supp. 76, 78 (S.D.N.Y.), *modified*, 165 F.2d 287 (2d Cir.1947).

A very few cases have considered ballast as cargo, but in those instances the ballast was something of value. For example, in *Lo Bue v. United States*, 75 F.Supp. 154, 154 (E.D.N.Y.1947), the court referred to a "cargo" of slag ballast. *See also New York Trap Rock Corp. v. Christie Scow Corp.*, 165 F.2d 314, 316 (2d Cir.1948) (unloading of "cargo" of ballast to a second ship for further transport). In none of these cases was the ballast simply worthless seawater.

An earlier version of the full wage provision provided for payment after the discharge of "cargo or ballast", but Congress later deleted the reference to ballast. *Compare* Seaman's Wage Act, ch. 29, § 6, 1 Stat. 133 (1790) *with* Shipping Commissioners' Act of 1872, ch. 322, § 35, 17 Stat. 269 (1872). Congressional intent underlying the revision is at best ambiguous. The reference to ballast may have been viewed as redundant. Yet coincident with the change, Congress added the discharge of the seafarer as a triggering event. In light of this added protection, it may have decided ballast discharge was no longer necessary as a triggering event.

We conclude that worthless seawater carried as ballast does not constitute cargo as envisioned by the Wage Act. Cargo is freight or goods that have some value. Even if each leg of the trip could be considered a separate

voyage, the Act's protections were not triggered when the log-carriers dumped their load of seawater on arrival in an American port.

2. Each trip as a voyage

Like "cargo", "voyage" is not defined in the Wage Act. The PINE FOREST court defined each leg of the trip as a voyage. We conclude that such a definition conflicts with the structure and language of the Act.

The Act contains both full and half wage provisions. The latter is triggered at every port in which the ship takes on or discharges cargo. We doubt Congress could have intended the broad definition of a voyage adopted by the PINE FOREST court. Defining a voyage as each leg of a trip renders the half wage provision meaningless, for under that definition the full wage provision could be invoked any time the half wage provision could apply.

The seamen insist, though, that courts have read the "end of voyage" requirement out of the statute. They rely on several recent decisions in which courts have held that the full wage provision applied though the ship never left port. For example, in *Griffin v. Oceanic Contractors*, 458 U.S. 564, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982), Griffin suffered an injury shortly after joining the vessel and before it sailed. Although the Court did not expressly consider whether he met the voyage requirement, it granted him relief under the full wage provision. *Id.* at 577, 102 S.Ct. at 3253.

In *Chung, Yong Il v. Overseas Navigation Co.*, 774 F.2d 1043 (11th Cir.1985), *cert. denied*, 475 U.S. 1147, 106 S.Ct.

1802, 90 L.Ed.2d 346 (1986), the court explicitly considered the issue. Like *Griffin*, the *Chung* crew were discharged after spending time on a ship that never left port. The court held that the voyage requirement did not preclude these men from invoking the full wage provision. *Id.* at 1051.

As we read *Griffin* and *Chung*, however, neither ignores the voyage requirement. Instead, they define voyage to further the Wage Act's protective purpose. A seaman's voyage ends when his commitment to work aboard the ship is terminated, either by completion of his contract or by premature discharge. *See, e.g., Mavromatis v. United Greek Shipowners Corp.*, 179 F.2d 310, 318-19 (1st Cir.1949); *The Cubadist*, 252 F. 658, 660, 662-63 (S.D. Ala. 1918), *aff'd*, 256 F. 203 (5th Cir.), *cert. denied*, 249 U.S. 618, 39 S.Ct. 392, 63 L.Ed. 804 (1919). Under this definition the *Griffin* and *Chung* seafarers had completed their voyages when they were discharged, even though the ships never left port.

Applying this definition, the PINE FOREST seafarers were not entitled to full wages each time the ship stopped in the United States or Japan. Rather, full wages became due four days after they were discharged following the filing of the complaint. Although they had not completed their contractual obligations, their voyages terminated when they were discharged.

C. Foreign seafarers discharged in foreign ports.

We start with the well-established principle that, absent a clearly expressed intent to the contrary, United

States statutes apply only within the territorial jurisdiction of the United States. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949). "We assume that Congress legislates against the backdrop of that presumption against extraterritoriality." *EEOC v. Arabian Am. Oil Co.*, ___U.S. ___, ___, 111 S.Ct. 1227, 1230, 113 L.Ed.2d 274 (1991). Because we find no clearly expressed intent to contradict this presumption, logic dictates that the full wage provision should not apply to foreign seafarers discharged from foreign ships in foreign ports.

This result is consistent with the plain language of the Wage Act, which is the clearer evidence of the Act's jurisdictional limits. The Act is part of Chapter 103 of Title 46, which notes that "[u]nless otherwise provided, this chapter does not apply to a foreign vessel." 46 U.S.C. § 10301(c). Against this background, the Act makes an exception for foreign vessels in American ports: "This section applies to a seafarer on a foreign vessel when in a harbor of the United States." *Id.* § 10313(i).

Nevertheless, the seafarers contend that crew members discharged overseas may recover under the Wage Act. They suggest that limiting the Act to foreign ships in United States ports thwarts one of the Act's underlying purposes. In their view, the jurisdiction limiting clause cannot really mean what it says. Alternatively, they insist that if some conduct facilitating the later withholding of wages occurred in an American port, the jurisdiction requirement is met.

They find some support in the case law. We have never decided the issue, and there is directly conflicting

authority among the districts in this circuit. In *Galon v. M/V Hira II*, 1990 A.M.C. 342, 1989 WL 211484 (W.D.Wash.1989), the court ruled without further analysis that "the statute does not require discharge in a United States port." *Id.* at 343. Shortly thereafter, the court in *Mateo v. M/S Kiso*, No. C-902357-DLJ ___ F.Supp. ___ (N.D.Cal.1991), held to the contrary, finding discharge in a United States port a prerequisite to applying the statute.

Confusion on this issue is not limited to this circuit's district courts. Some other courts have been willing to extend the Act to foreigners discharged in foreign ports. In *Ventiadis v. C.J. Thibodeaux & Co.*, 295 F.Supp. 135 (S.D.Tex.1968), the court held that "to limit [the Act] only to instances in which the seafarer is discharged in an American port would be to unreasonably restrict its effect." *Id.* at 138; *see also Fitzgerald v. Liberian S/T Chryssi P. Goulandris*, 582 F.2d 312, 314 (4th Cir. 1978) (extraterritorial discharge does not preclude application of the Act).

Other courts have followed the view expressed in dictum by Judge Friendly in *Monteiro v. Sociedad Maritima San Nicolas, S.A.*, 280 F.2d 568 (2d Cir.), *cert. denied*, 364 U.S. 915, 81 S.Ct. 272, 5 L.Ed.2d 228 (1960). Judge Friendly reasoned that "[t]he natural reading is rather that a seafarer on a foreign vessel obtains his right once the specified facts occur while the vessel is in a harbor of the United States. . . . " *Id.* at 574; *see also Cubeiro v. Sun Seaway Enters.*, 539 F.Supp. 1175, 1177 (S.D.N.Y.1982) ("[I]t is now well settled that a foreign seafarer, sailing on board a foreign-flag vessel, may file a [wage] claim in a United States court . . . if he was discharged from the vessel in a United States port. . . . However, it is equally

clear that for the statute to apply, the discharge must have taken place in a United States port."); *Barcelona v. Sea Victory Maritime*, 1992 A.M.C. 369, 372, 1991 WL 323803 (E.D.La.1991) (discharge must be in United States port); *Angad v. M/V Fareast Trader*, 1989 A.M.C. 2721, 2728, 1989 WL 201605 (S.D.Tex.1989) (wages can accrue anywhere, but withholding of payment must be in United States port).

The seafarers argue that if this court adopts Judge Friendly's view, it will confound one of the Act's underlying purposes. Congress was primarily concerned with protecting seafarers when it enacted these provisions. *Griffin*, 458 U.S. at 572, 102 S.Ct. at 3250. But Congress also sought to enhance the competitiveness of American shippers. It worried that subjecting only United States flag vessels to the wage provisions would put United States shipping at a competitive disadvantage. To level the playing field, it extended the Act to foreign vessels. 50 Cong. Rec. 55748-49 (Oct. 22, 1913).

Had Congress wanted to include all foreign vessels, however, it could have done so expressly. The language of the Wage Act is clear. It applies only to foreign vessels in United States ports. To let one of the Act's underlying purposes trump the statute's plain language would violate a basic tenet of statutory construction. *Cf. Commissioner v. Brown*, 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965) (purpose can override plain language only in an exceptional case).

But the seafarers also contend that the final withholding of wages was part of an ongoing scheme by the

shipowners, during the entire course of a voyage. Conduct integral to the scheme occurred while the ships were in United States harbors, say the seafarers, thus satisfying the Act's jurisdictional requirement.

Under this theory, a single pause at a United States port during the course of a three-year voyage would trigger the protections of the Wage Act. Such an expansive reading contradicts the Act's plain language. Nor is such a broad reading necessary to further the Act's purpose of equalizing shipping costs between foreign and United States vessels. Each time a foreign vessel takes on or discharges cargo in a United States port, the foreign crew may invoke the Act's half wage provision. If the master refuses to pay, the men may invoke the full wage provision. Foreign vessels cannot avoid the Act simply by ensuring that they never complete a voyage in a United States port.

It is also unclear what wrongful conduct the shipowners engaged in while in a United States port. The Act imposes harsh penalties but only for specific, well-defined conduct: the wrongful withholding of wages. Until that occurs, the Act's protections are unavailable. For those seamen discharged overseas, that prohibited conduct did not occur in a United States port.

D. Demand for half wages

The seafarers insist that even if they cannot obtain relief under the full wage provision, they can invoke section 10313(e), the half wage provision. This section allows crew members to claim half their accrued wages

when they are in a United States port loading or unloading cargo. The difficult issue of jurisdiction over foreign crews in foreign ports does not arise here, because each of the three ships loaded cargo in United States ports.

The key to the seamen's claim is whether they made an effective demand for half wages, as the Act requires. They insist they did, by executing wage receipts. They would have us believe that each time they signed a false receipt acknowledging payment of union scale wages, they were in fact demanding payment at that rate.

But for a demand to be effective, it must plainly and unequivocally request payment. "The demand must be plainly made so that the master will know exactly what is demanded of him, and since if he refuses the payment of the half wages, all of the wages then become due, it becomes obvious that clarity in the making of the demand is essential." Martin J. Norris, *The Law of Seamen* § 17:33 (4th ed. 1985); *see also In re Ivertsen*, 237 F. 498, 501 (N.D.Cal.1916).

Signing wage receipts as part of the double-bookkeeping scheme falls far short of an effective demand, for it fails to notify the ships' masters of the crews' claims. It would more easily have been interpreted as acceptance of the double-bookkeeping scheme rather than a demand for higher wages.

The seamen virtually admit this, saying that had they made their demands explicit, they would have been terminated. To allow such a hidden demand to satisfy the demand requirement would effectively eliminate it.

E. Summary of statutory claims

1. The PINE FOREST

The PINE FOREST crew discharged in the United States are entitled to back pay at the full union scale described in the ship's articles. The shipowners paid this amount when they tendered $267,586. The court erred in assessing penalties based on the mistaken conclusion that each trip was a voyage and that ballast was cargo.

The PINE FOREST crew discharged overseas are not covered by the Wage Act's full wage provision and did not make an effective demand for half wages. The court erred in awarding them back wages and statutory penalties.

2. The SOUTHERN ASTER

All the seamen were discharged overseas. The court did not err when it dismissed their statutory claims, nor did it abuse its discretion when it dismissed their tort claims on the grounds of *forum non conveniens*.

3. The FIR GROVE

The five FIR GROVE seamen seeking intervention were all discharged overseas. The court properly denied intervention.

III

Besides awarding back wages and statutory penalties, the PINE FOREST court also awarded substantial

tort damages. The court granted the crew $8.5 million in compensatory damages and punitive damages totalling $17 million. Yet neither the court's findings nor the evidence underlying them supports any of the tort theories on which the award is based.

A. Fraud

As a court sitting in admiralty, we look to the common law in considering maritime torts. *Guidry v. Durkin*, 834 F.2d 1465, 1470 (9th Cir.1987). We turn then to Washington's definition of fraud and its nine elements: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) an intent that it be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) reliance on its truth; (8) the right to rely thereon; and (9) consequent and proximate injury. *Markov v. ABC Transfer & Storage Co.*, 76 Wash.2d 388, 457 P.2d 535, 539 (1969). Each element is essential; if any is missing, the entire claim fails. *Id.*

The seafarers suggest that there were several misrepresentations that support a finding of fraud: (1) the shipowners planned to lie to union inspectors about the wage rates; (2) the manning agency told the seafarers they would receive a wage close to the union rate; and (3) the shipowners deliberately misled the seafarers about their rights to receive the union wage.

The shipowners admit an intent to deceive the union. This amounts to an intended misrepresentation to the seamen, say the crew, because of their relationship with the union. The union represented them. Under well-

established principles of agency law, an attempt to deceive an agent ordinarily constitutes an attempt to deceive the principal. Restatement (Second) of Agency § 315 (1957). Yet if the principal knows the true facts, the attempted deception may not be imputed to the principal. These seamen not only knew the facts but had agreed to help the shipowners to carry out the deception by lying to union inspectors. To call this a misrepresentation to the seafarers would stand agency law on its head.

The seamen argue, however, that even though they were a party to the misrepresentation, it nevertheless deprived them of one of the essential benefits of union representation. By negotiating a deal behind the back of the union, the owners undercut the union's role as the seamen's representative. Maybe so, but it is not fraud on the seafarers.

The men also insist that the manning agency misrepresented that they would be paid a wage that approximated the union wage. The court's express findings refute this. It found that the shipping articles "contained a significantly higher pay scale than the oral representations made to plaintiffs by [the manning agency]." Ample testimony by the seafarers supports this finding.

Finally, the seafarers say that the shipowners' failure to tell them that they were entitled to higher wages was a misrepresentation. The court's findings do not support this theory, nor are we willing to hold that this was a representation, let alone a misrepresentation.

The failure to show a misrepresentation is alone enough to undermine the seamen's claim of fraud, but they also failed to show either reliance or the shipowners'

intent to induce reliance on any alleged misrepresentations. Accordingly, we conclude that there was no fraud.

B. Outrage

The claims of intentional infliction of emotional distress are based both on the notations made in the seamen's books and their participation in the double-bookkeeping scheme.

To prove intentional infliction of emotional distress, the seafarers must show that: (1) the conduct complained of was extreme and outrageous; (2) the distress was intentionally or recklessly inflicted; and (3) they suffered actual severe emotional distress. *Rice v. Janovich,* 109 Wash.2d 48, 742 P.2d 1230, 1238 (1987); Restatement (Second) of Torts § 46 cmt. d (1965) (hereafter, "Restatement").

> To be outrageous conduct, it must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Restatement § 46 cmt. d; *see also Contreras v. Crown Zellerbach,* 88 Wash.2d 735, 565 P.2d 1173 (1977) (adopting cmt. d). It is not enough that the conduct was maliciously, tortiously or criminally intended.

Several factors bear on the determination whether the alleged conduct meets this standard:

(1) the position occupied by the defendants;

> (2) whether plaintiffs were particularly susceptible to emotional distress, and if defendant knew this fact;
>
> (3) whether defendants' conduct may have been privileged under the circumstances;
>
> (4) whether the degree of emotional distress caused by a party was severe as opposed to mere annoyance, inconvenience, or normal embarrassment; and
>
> (5) whether the actor was aware that there was a high probability that his or her conduct would cause severe emotional distress and proceeded in a conscious disregard of it.

Spurrell v. Bloch, 40 Wash.App. 854, 701 P.2d 529, 535, *review denied*, 104 Wash.2d 1014 (1985).

1. The discharge notations

The PINE FOREST's master entered the reason for discharge in each of the thirteen seafarer's books: "Requested repatriation upon filing wages claim to arrest vessel." This alone does not constitute outrageous conduct.

It is, rather, an accurate reflection of events. These thirteen men had requested repatriation after filing wage claims to arrest the vessel. Accurate statements about an employee's performance generally do not constitute outrage. *Dicomes v. State*, 113 Wash.2d 612, 782 P.2d 1002, 1013 (1989).

Furthermore, "[t]he actor is never liable . . . where he had done no more than insist upon his legal rights in a permissible way, even though he is well aware that such

insistence is certain to cause emotional distress." Restatement § 46 cmt. g. The master did no more than record an accurate statement of the reason for discharge and the conduct does not rise to the level of outrageous conduct.

2. The double-bookkeeping scheme

The seamen claim distress from their participation in the double-bookkeeping scheme. Yet they failed to show either that the conduct was outrageous or that they suffered any severe emotional distress.

Outrageous conduct far exceeds the bounds of decency. As the Restatement explains, it takes more than "mere insults, indignities, threats, annoyances, or petty oppressions, or other trivialities". Restatement § 46 cmt. d; *see also Grimsby v. Samson*, 85 Wash.2d 52, 530 P.2d 291, 295 (1975). Enlisting the men's help in deceiving the union may be objectionable, but it was not "beyond all possible bounds of decency and utterly intolerable in a civilized society." Restatement § 46 cmt. d.

Nor did these plaintiffs show that they suffered severe or extreme emotional distress, with objectively manifested symptoms. *Hansley v. Giard*, 87 Wash.2d 424, 553 P.2d 1096, 1103 (1976). More than the stress of everyday life must be shown. *Id.; see also Spurrell*, 701 P.2d at 535-36 (one sleepless night, tears, loss of appetite and anxiety is not severe emotional distress); *Lawson v. Boeing Co.*, 58 Wash.App. 261, 792 P.2d 545, 550-51 (1990) (loss of appetite, libido and energy, sleeplessness and increased headaches did not satisfy severe emotional distress element), *review denied*, 116 Wash.2d 1021, 811 P.2d 219

(1991). The court did not find any objectively manifested symptoms and the seafarers failed to allege them.

C. Blacklisting

The seamen say that by recording the reason for discharge in their seamen's books, the shipowners violated the prohibition against blacklisting.

Few courts have considered blacklisting claims. The Restatement explains blacklisting as

> intentionally and improperly interfer[ing] with another's prospective contractual relation- . . . whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

Restatement § 766B. If the statement is true, however, it is not improper:

> One who intentionally causes a third person . . . not to enter into a prospective contractual relation with another does not interfere improperly . . . by giving the third person
>
> (a) truthful information, or
>
> (b) honest advice within the scope of a request for the advice.

Id. § 772; *see also id.* cmts. a, b.

The seamen do not dispute that the entries were accurate and true and their claim of blacklisting fails.

IV

Ordinarily, the prevailing party in a maritime action is not entitled to attorneys' fees. Under the courts' equitable powers, however, a court may award fees when the defendant has forced the plaintiff to "go to court to get what was plainly owed him". *Vaughan v. Atkinson*, 369 U.S. 527, 531, 82 S.Ct. 997, 999, 8 L.Ed.2d 88 (1962).

The PINE FORST court awarded $564,737 in attorneys' fees, apportioned thus: $410,043 for the seamen discharged in the United States and $154,693 for those discharged overseas. We affirm that portion of the judgment awarding fees to the men discharged here and reverse the award to those discharged overseas.

The shipowners contend that they should not be required to pay any such fees, for they tendered the amount due shortly after the men left the ship. Yet they also pressed counterclaims for back wages paid, for the costs of what they thought was an excessive bond and for the costs of defending the action in the United States. We agree with the district court that the men discharged here had no choice but to seek the help of the court to retain the wages to which they were plainly entitled.

V

The judgment of dismissal in the SOUTHERN ASTER case is affirmed, as is the judgment denying intervention to the FIR GROVE seafarers. The parties will bear their own costs on appeal in both cases.

The PINE FOREST judgment is reversed, except for that portion of the judgment granting attorneys' fees to the men discharged in the United States. The parties will bear their own costs.

I Hyeon SU, et al, Plaintiffs,

v.

M/V SOUTHERN ASTER, In Rem, and Southern Aster Navigation, S.A., Defendants.

Civ. No. 90-165-MA.

United States District Court, D. Oregon.

Feb. 28, 1990.

On Reconsideration May 10, 1990.

Richard I. Dodson, Thomas E. Richard, Baton Rouge, La., John Buehler, Bullivant, Houser, Bailey, Pendergrass & Hoffman, Portland, Or., for plaintiffs.

Paul N. Wonacott, Wood, Tatum, Mosser, Brooke & Landis, Portland, Or., for defendants.

OPINION

MARSH, District Judge.

Plaintiffs are twenty former crew members of the M/V SOUTHERN ASTER and The Federated Korean's Seamen's Union (FKSU). All plaintiffs are citizens of Korea. Plaintiffs seek to recover back wages and penalties pursuant to 46 U.S.C. § 10313 as well as compensatory and punitive damages for alleged fraudulent labor practices. On February 21, 1990, plaintiffs filed a complaint with this court and the Southern Aster was arrested at the Port of Coos Bay by United States Marshals. On February 23, 1990, an expedited hearing was held at which time I set the amount of the bond to be posted in order to secure

release of the vessel at $500,000. The following constitutes a written formalization of my oral rulings and conclusions of law.

This action originally came before me on defendants' motion to dismiss plaintiffs' wage claims for lack of jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) and their motion to vacate the arrest of the M/V Southern Aster. At the first expedited hearing held on February 22, 1990, I denied defendants' motion to dismiss for lack of subject matter jurisdiction. I found that the cases relied upon by defendants may have supported a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6), but they did not support defendants' contention that this court was without subject matter jurisdiction to hear the wage claims of foreign seamen under general maritime law. *See Cuevas v. Reading and Bates Corp.*, 770 F.2d 1371, 1380 (5th Cir. 1985)[1] (court discusses applicability of former section 46 U.S.C. § 10313 to foreign seamen's claims, but does not address threshold jurisdiction issue); and *Monteiro v. Sociedad Maritima San Nicolas, S.A.*, 280 F.2d 568, 574 (2nd Cir.), *cert. denied*, 364 U.S. 915, 81 S.Ct. 272, 5 L.Ed.2d 228 (1960) (same).

At the end of this hearing I directed the parties to address the issue of setting a bond to release the vessel pursuant to Admiralty Rule E(5)(a). The parties stipulated that the value of the vessel was $10 million and thus the maximum amount allowable under Rule E(5). Thereafter, plaintiffs submitted a memoranda in which they

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[1] The holding in *Cuevas* as it relates to the doctrine of forum non conveniens was expressly overruled in *In re Air Crash Disaster Near New Orleans, L.A.*, 821 F.2d 1147, 1163 (5th Cir. 1987).

argued that they were entitled to a bond for the full value of the vessel as their claims for back pay, penalty wages, and compensatory and punitive damages exceeded $10 million.[2] Defendants indicated a willingness to agree to a bond of $500,000 to cover claims for back wages under general maritime law, but argued that plaintiffs had failed to state a claim for penalty wages under section 10313(g). I indicated to the parties that I would not consider plaintiffs' claims for compensatory or punitive damages based upon my earlier ruling on the identical issue in *Jose, et al. v. M/V Fir Grove,* Civ. No. 90-6028-MA (February 7, 1990) (oral ruling denying inclusion of plaintiffs' fraud damages within bond amount under Rule E(5)(a)).

Rule E(5)(a) provides that the amount of the bond set shall be up to two times plaintiffs' claim "fairly stated." Section 10313(i) provides that the section will apply only to "seamen on a foreign vessel when in a harbor of the United States." Thus, the issue presented before me in this case was whether foreign seamen, discharged from their foreign vessel in a foreign port in May of 1988, could bring a claim for penalty wages under section 10313 against the owner of a foreign vessel.

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[2] Plaintiffs claim the following in damages: 1) approximately $250,000 in back wages; 2) approximately $13 million in penalty wages pursuant to 46 U.S.C. § 10313(g) through 2/28/90 or $28.8 million through 12/91; 3) $3.3 million in compensatory damages; and 4) $3.3 million in punitive damages.

On February 23, 1990, I held an additional hearing to set the amount of the bond. After reviewing the memoranda and cases cited by both parties and hearing additional arguments regarding plaintiffs' basis for claiming penalty wages under section 10313(g), I determined that plaintiffs had failed to state a claim for penalty wages. In reaching this conclusion, I found that each of the cases relied upon by plaintiffs was distinguishable in several material respects. First, in *Henry v. S/S Bermuda Star,* 863 F.2d 1225 (5th Cir. 1989), the Court addressed the issue of the dual application of Panamanian and United States Labor Law to the plaintiff-seamen's wage claims. The Court held that a repatriation deduction made in accordance with Panamanian law would not be considered illegal under the U.S. wage penalty provision (section 10313) although not expressly excluded under the statute. At footnote 70 of that opinion, the court expressly limited the application of its holding to the facts at hand and declined to hold that section 10313 was directly applicable to foreign seamen's wage claims. Similarly, in *Thomas v. SS Santa Mercedes,* 572 F.2d 1331 (9th Cir. 1978) the Court addressed the issue of when the plaintiff was "discharged" for the purposes of determining the amount of the penalty claim, but did not address the threshold issue presented here regarding the nationality of the seamen or of the vessel owner and the plaintiff's entitlement to state a claim under section 10313.

Finally, I found that while Judge Dwyer's decision in *Galon, et al. v. M/V HIRA II, et al.,* Civ No. 89-888, 1989 WL 211484 (order filed Oct. 27, 1989) and the decision in *Ventiadis v. C.J. Thibadeaux & Company,* 295 F.Supp. 135

(S.D. Tex. 1968) lend some support to plaintiffs' argument, both decisions are distinguishable and unpersuasive. In *Ventiadis,* the trial judge gave great weight to the fact that the beneficial owner of the vessel was an American citizen and thus, the suit was between two foreign nationals "in name only." In *HIRA II,* Judge Dwyer concluded, without discussion, that the penalty wage claims of foreign seamen could be included within the release bond based upon *Henry* and *Thomas,* discussed above. Because I find that the holdings in *Henry* and *Thomas* are not dispositive of the issue presented here, I do not agree with Judge Dwyer's conclusion and decline to adopt it.

Based on the foregoing, I concluded that the bond should be set at $500,000, or roughly two times the plaintiffs' claim for back wages "fairly stated." I found that doubling was necessary to account for costs and time spent in litigation. Based upon defendants' submission of a letter of credit and plaintiffs' stipulation as to the adequacy of the security which will bear interest at a rate of 6%, I signed an order releasing the vessel immediately following the hearing.

ON RECONSIDERATION

Plaintiffs are former crew members of the M/V SOUTHERN ASTER and the Federated Korean's Seamen's Union (FKSU). Plaintiffs seek to recover back wages and penalties pursuant to 46 U.S.C. § 10313 as well as compensatory and punitive damages for alleged fraudulent labor practices. On February 23, 1990, I granted defendant's motion to dismiss plaintiffs' penalty wage claims upon argument and without opinion due to the

expedited nature of the hearing. On April 23, 1990, I granted plaintiffs' motion for reconsideration of my prior order because of the time constraints and plaintiffs' submission of additional authorities. In addition, defendant moves to dismiss this action based upon the doctrine of *forum non conveniens* and plaintiff moves to consolidate this case with *Munoz v. M/V SOUTHERN ASTER*, Civ. No. 90-122-MA. For the reasons that follow, my prior ruling dismissing plaintiffs' claims for penalty wages pursuant to Fed.R.Civ. P. 12(b)(6) is affirmed, defendant's motion to dismiss on the basis of *forum non conveniens* is granted and plaintiffs' motion to consolidate is denied as moot.

BACKGROUND

On February 21, 1990 the Southern Aster was arrested at the Port of Coos Bay by United States Marshals. On February 22 and 23, 1990, I conducted an expedited hearing to set the amount of bond necessary to release the vessel. In addition, I denied defendants' motion for dismiss for lack of jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), but granted its motion to the extent it sought to dismiss plaintiffs' claims for penalty wages under § 10313.

At the hearing on February 23, 1990, and in a follow-up opinion issue on February 28, 1990, I found that plaintiffs claims for penalty wages were not "fairly stated" and thus could not be included within the amount of the bond. In addition, I determined that plaintiffs had failed to state a claim for penalty wages under § 10313. Based upon the cases submitted by both parties, I found that there was no legal support for plaintiffs' contention

that foreign seamen, discharged from a foreign vessel, in a foreign port were entitled to the protection of the U.S. Shipping Act.

DISCUSSION

1. *Reconsideration of the Applicability of Penalty Wages*

The United States Shipping Act, 46 U.S.C. § 10313, provides in relevant part:

* * *

> (f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.
>
> (g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed.
>
> * * *
>
> (i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

Plaintiffs are all Korean citizens. The Southern Aster is owned by a Panamanian company, flies the Panamanian flag and its beneficial owner is Japanese. Plaintiffs

were discharged from the Southern Aster in Japan in May of 1988.

Subsection (f) of the statute provides that the penalty wage provision is only triggered upon "discharge of cargo or seaman." All of the cases cited by plaintiff in which a foreign seaman has been allowed to recover under U.S. wage provisions involve actual *discharge* at a United States port. *See, Patterson v. Bark Eudora,* 190 U.S. 169, 23 S.Ct. 821, 47 L.Ed. 1002 (1903) (anti-advance wage statute applies to foreign seamen where the wrongful acts on the territory and within the jurisdiction of the U.S.); *The Sonderborg,* 47 F.2d 723 (4th Cir. 1931) (wage statute applies where foreign seamen who signed on in New Orleans were discharged in Norfolk, Virginia); *Caribbean Federation Lines v. Dahl,* 315 F.2d 370 (5th Cir.) *cert. denied* 375 U.S. 831, 84 S.Ct. 76, 11 L.Ed.2d 62 (1963) (statute held applicable to foreign seamen aboard a foreign owned vessel where discharged in Mobile, Alabama); *Mihalinos v. Liberian S.S. Trikala,* 342 F.Supp. 1237 (S.D.Cal.1972) (Greek seaman discharged in Alaska, court did not reach issue of applicability of wage statute, finding instead that claim not made in good faith).

In *Strathearn v. Dillon,* 252 U.S. 348, 40 S.Ct. 350, 64 L.Ed. 607 (1920), a British seaman on board a British vessel invoked what is now 46 U.S.C. § 10313(e) which allows a seaman to receive one-half of the balance of wages earned and unpaid upon demand while the ship was in Pensacola, Florida. Justice Brandeis held that the provision conferring the right to demand half-wages applies to foreign seamen on foreign vessels, "when they enter our ports." The Court reasoned that subjection to U.S. law in order to override valid foreign contractual

provisions to the contrary, is a "condition of the right to such foreign vessels to enter and use ports of the U.S." *Id.* at 356, 40 S.Ct. at 352. *See also Southern Cross S.S. Co. v. Firipis,* 285 F.2d 651 (4th Cir. 1060) *cert. denied* 365 U.S. 869, 81 S.Ct. 903, 5 L.Ed.2d 859 (1961) (Greek seaman may claim past wages and penalties in this country after the ship reaches an American port).

Similarly, the legislative history relied upon by plaintiffs wherein they cite Senator Fletcher's debate of 1915 (regarding the predecessor statute, 46 U.S.C. §§ 596, 597), although comprehensive in its intent to equalize costs between foreign and domestic merchant vessels, similarly recognizes a jurisdictional limit to vessels in ports of the United States. Congressional Record-Senate, October 22, 1915 at 5748.

In addition, plaintiffs contend that *Hellenic Lines, Ltd. v. Rhoditis,* 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970) demonstrates that plaintiffs need only have substantial contacts with the U.S. in order to invoke U.S. laws. However, *Rhoditis* involved a claim brought pursuant to the Jones Act and the Court's analysis was limited to finding whether or not plaintiffs had established sufficient minimum contacts in order to avoid a dismissal based upon the doctrine of *forum non conveniens.* Thus, the Court did not address the applicability of the Shipping Act nor its specific provision requiring discharge as a prerequisite to a claim for penalty wages. § 10313(f). *See also Mihalinos,* 342 F.Supp. 1237.

In my prior ruling, I also found that each of the cases originally relied upon by plaintiffs was distinguishable in

several material respects. Plaintiffs offer no new arguments regarding their prior cited cases, but specifically re-urge me to adopt Judge Dwyer's conclusion in *Galon, et al. v. M/V HIRA II, et al.*, Civ. No. 89-888, 1989 WL 211484 (order filed Oct. 27, 1989). In *HIRA II*, Judge Dwyer concluded, without discussion, that the penalty wage claims of foreign seamen could be included within the release bond. However Judge Dwyer did not address the jurisdictional issues raised here and based his conclusion on *Henry v. S/S Bermuda Star*, 863 F.2d 1225 (5th Cir.1989) and *Thomas v. SS Santa Mercedes*, 572 F.2d 1331 (9th Cir.1978), both of which I found were distinguishable as they failed to address the threshold jurisdictional inquiry.

In *Escobar v. S.S. Washington Trader*, 640 F.2d 1063 (9th Cir.1981), the plaintiff, whose nationality is uncertain from the text of the opinion, was discharged in Manila and sought recovery under the U.S. penal wage statute.[1] The court did not discuss jurisdiction, and its holding was limited to the issues of the timeliness of plaintiff's claim and whether or not defendant was entitled to credit for funds expended by the owner for a plane ticket back to the United States. However, the court did note that plaintiff was discharged from an American Merchant vessel.

In *Heros v. Cockinos*, 177 F.2d 570 (4th Cir.1949), the court held that the anti-advance statute applied to foreign

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[1] Plaintiffs refer to Escobar as a "Philippine national." However, the court indicates that plaintiff was an "illegal alien" while in the Philippines. Defendant contends that Escobar was an American.

seamen discharged in foreign ports where the illegal advances and deductions occurred in the United States. Following that opinion, the Fourth Circuit refused to reach the issue of the applicability of the U.S. wage statute to a foreign seaman, on a foreign vessel when in a foreign country. *Fitzgerald v. Liberian S/T Chryssi P. Goulandris,* 582 F.2d 312, 314 (4th Cir.1978). However, the court distinguished *Heros* on the basis that the illegal acts in *Heros* actually occurred within the United States. *Id.* 582 F.2d at 313. The court went on to hold that the U.S. wage statute was inapplicable because plaintiff's estate failed to present a good faith claim for an "end of voyage" payment since plaintiff had only served 23 days out of his one year contract before his death. The Court reasoned that death did not constitute "discharge" which would invoke the end of voyage payment. *See also Morewitz v. Andros Compania Maritima, S.A.,* 614 F.2d 379 (4th Cir.1980) (court did not address jurisdiction, but held claim for end of voyage payment not made in good faith because death does not constitute a discharge).

Finally, several cases relied upon by plaintiffs hold that U.S. wage statutes are applicable to U.S. seamen discharged in foreign ports, *Matise v. American Foreign Steamship Co.,* 488 F.2d 469 (9th Cir.1974), *rev'd* 423 U.S. 150, 96 S.Ct. 410, 46 L.Ed.2d 354 (1975); *Vincent et al. v. United States,* 272 F. 889 (9th Cir.1921), or foreign seamen serving on an American vessel, *see Arguelles v. U.S. Bulk Carriers,* 408 F.2d 1065 (4th Cir.1969) *aff'd,* 400 U.S. 351, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971). I find all of these cases distinguishable from the facts presented in this case.

Plaintiffs argue that § 10313 applies to foreign seamen, who work or worked aboard foreign vessels and

who are discharged at any port in the world on the basis of a subsequent entry of the vessel into a U.S. port. Plaintiffs contend that the vessel need only have been in a U.S. harbor at some point in time with the plaintiffs seamen on board for the penalty wage statute to apply to their claims. Otherwise, plaintiffs argue, foreign shipowners could effectively circumvent United States laws by consistently discharging their foreign crews in foreign ports, even though all or most of their shipments were to and from the United States. However the statute relied upon by plaintiffs as the basis of their claim for penalty wages clearly requires "discharge" of either cargo or crew as a prerequisite to recovery and no court has yet to find such an extension appropriate. Thus, the statute creates a "gap" wherein foreign vessel owners may avoid the penalty wage provisions so long as they leave a domestic port without being haled into court and discharge their seamen in a foreign port.

Although plaintiffs' argument is well-taken, and I can envision how such a tactic could potentially be abused by foreign vessel owners, the statute clearly requires discharge in a U.S. port as a jurisdictional prerequisite. Further, no court has extended the coverage of the U.S. wage provisions to a situation analogous to that presented here. Based on the foregoing, I find that plaintiffs have failed to state claims for penalty wages as they are not entitled to recover under the U.S. Shipping Act's wage laws, 46 U.S.C. § 10313(g). Accordingly, my prior ruling dismissing their claim for penalty wages is affirmed.

2. *Motion to Dismiss for Forum Non Conveniens*

In *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953) the Supreme Court set forth the test for determining whether or not a U.S. court should exercise jurisdiction under the Jones Act for injuries sustained by a foreign seaman while serving aboard a foreign vessel, where his only contact with the U.S. forum was the signing of his shipping articles while he was in this country temporarily. In determining that the Jones Act was inapplicable because of insufficient contacts with the United States, the Court considered the following factors: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance of the domicile of the injured; (4) the allegiance of the defendant shipowner; (5) the place of the contract; (6) the inaccessibility of the foreign forum; and (7) the law of the forum. However, the *Lauritzen* test is not exhaustive. In subsequent cases the Supreme Court has also considered defendant's base of operations, and whether defendant has had "substantial and continuing" business contacts with the forum. *Hellenic Line Ltd. v. Rhoditis*, 398 U.S. 306, 310, 90 S.Ct. 1731, 1734, 26 L.Ed.2d 252 (1970).[2]

The central focus of a *forum non conveniens* inquiry is convenience, and the factors must be applied flexibly and comprehensively, with no one decisive factor. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250, 102 S.Ct. 252, 263, 70

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[2] In *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959), the Supreme Court affirmed the test set forth in *Lauritzen* and applied it to an action brought by a foreign seaman under the general maritime law of this country.

L.Ed.2d 419 (1981).[3] In addition, the court must determine whether an alternative forum exists. *Id.* at 253, n. 22, 102 S.Ct. at 265, n. 22. Dismissal is appropriate where trial in plaintiff's chosen forum "imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice." *Id, citing Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).

Plaintiffs first argue that jurisdiction is mandatory given the application of the U.S. wage statute, 46 U.S.C. § 10313. Second, plaintiff argues that the balance of factors favors a U.S. forum given the application of general maritime law to their wage and fraud claims, defendant's extensive transactions with Oregon, and their contention that all of their major witnesses are English speaking and reside in the United States. However, plaintiff only identifies one U.S. witness, an American inspector for International Transport Worker's Federation (ITF), an international union affiliated with FKSU.

In carefully weighing all of the factors present in this case, I find that dismissal on the basis of *forum non*

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[3] Although no one factor may be determinative, factors of greater importance have been identified as the domicile of the plaintiff, the base of operations and place of substantial contacts, the accessibility of the foreign forum, and the law of the flag. Thomas Schoenbaum, Admiralty and Maritime Law 190-191 (West Pub.1987) *citing Sigalas v. Lido Maritime, Inc.,* 776 F.2d 1512 (11th Cir.1985); *Villar v. Crowley Maritime Corp.,* 782 F.2d 1478 (9th Cir.1986); *Dracos v. Hellenic Line, Ltd.,* 762 F.2d 348 (4th Cir.1985); *Pereira v. Utah Transport, Inc.,* 764 F.2d 686 (9th Cir.1985) *cert. dismissed,* 475 U.S. 1040, 106 S.Ct. 1253, 89 L.Ed.2d 362 (1986).

conveniens is appropriate on three grounds. First, either Korean, Japanese, or Panamanian law will apply to plaintiffs' wage claims. Plaintiffs were recruited in Korea and the Collective Agreement, which specifically provides for the application of Korean law, was executed in Pusan, Korea. The voyages of the SOUTHERN ASTER all began and terminated in Japan. Plaintiffs joined the ship in Japan and were discharged in Japan. The law of the flag is Panamanian.

Second, the case would be more conveniently tried in another forum given that the contracts and documentation are in Korea and Japan, all plaintiffs reside in Korea, and defendant's base of operations is in Japan. Given the probable application of Korean contract and labor law and the interests of Korea in this dispute, trial in Korea would be more appropriate in its court as well.

Finally, an alternative forum exists in Korea. In its Reply, defendant agrees that as a condition to dismissal of this action, defendant would submit to the jurisdiction of a Korean court. Defendant alleges, and plaintiff does not dispute that Korea is viable alternative forum.

Although it appears from the pleadings that defendants have had substantial contacts with the U.S., the balance of factors tips in favor of dismissal. The parties, alleged wrongful acts, source of proof and majority of witnesses all appear to be in either Japan or Korea. The collective agreement itself calls for the application of Korean law to this dispute, and both parties agree that Korea is an available alternative forum. United States jurisdiction is not mandatory given my previous finding that the U.S. Shipping Act wage statutes do not apply to

plaintiffs' claims.[4] The interests of the United States in resolution of this matter is minimal, while the interests of Korea and Japan appear substantial given the need for consistent application of contract and labor law principles to this dispute. Defendants base of operations is in Japan and Korea, all plaintiffs reside in Korea, and all documentary evidence is in Japan and Korea.

Based on the foregoing, defendant's motion to dismiss on the basis of *forum non conveniens* is granted in light of the substantial burden that would be imposed upon defendant and the court and the interests of Korea and resolution of this dispute. Both public and private factors indicate that dismissal is both appropriate and fair.

3. *Plaintiffs' Motion to Consolidate*

Plaintiffs move to consolidate this action with another action currently pending before this court, *Munoz, et al. v. Southern Aster,* Civ. No. 90-122-MA. At the hearing held on April 23, 1990, plaintiffs agreed that if defendant's motion to dismiss was granted, that their motion to consolidate would be moot. Accordingly, in light of my ruling dismissing this action on the basis of

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[4] During oral argument, plaintiffs offered an additional basis for mandatory jurisdiction under 46 U.S.C. § 10313(e) which provides that seamen may recover one-half of the balance of wages earned, on demand, at each port at which the vessel is loaded. However plaintiff offered no evidence, nor am I able to find any indication in the record, that a demand for one-half wages was ever made at any port.

forum non conveniens, plaintiffs' motion to consolidate is denied as moot.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

I. HYEON SU; JO SEONG GU, et al.; GIM YEONG HO; PARK MIN HO, et al.; BARG YEONG PAL; SEO JEOM TAE; LEE SIL GWANG; JUNG JU GOANG; JI JE JE; O HAN SEON; SON CHI IL; CHOI WEON IL; CHU CHAE SOK; KIG OG NAM; HAN BAG KIL; PYEON YUN SU; PARK SUNG OK; KA CHAE HO; FEDERATED KOREAN SEAMEN'S UNION, et al., Plaintiffs-Appellants, v. M/V SOUTHERN ASTER; SOUTHERN ASTER NAVIGATION, S.A., Defendants-Appellees.	Nos. 90-35485 90-35486 D.C. No. CV-90-165-MA
NELSON R. RABY; TEOFANIS F. ROZ; APOLONIO H. TORRELIZA; ASSOCIATED MARINE OFFICERS & SEAMAN'S UNION OF THE PHILIPPINES; S. GALUA; BOIFACIO C. TABADA, et al; LEO C. AJERO; TEODULO R. RABIE; MARCELO G. SUAREZ; MIGUELITO A. CABALES, et al., Plaintiffs-Appellees, v. M/V PINE FOREST; DELICA SHIPPING, S.A.; INUI STEAMSHIP CO., LTD., Defendants-Appellants.	Nos. 90-35618 90-35879 91-35375 D.C. No. CV-90-5038-JET ORDER (Filed Dec. 9, 1992)

Before: WRIGHT, BEEZER, and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing, and Judges Beezer and Leavy have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

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46 U.S.C. § 10313. Wages

(a) A seaman's entitlement to wages and provisions begins when the seaman begins work or when specified in the agreement required by section 10302 of this title for the seaman to begin work or be present on board, whichever is earlier.

(b) Wages are not dependent on the earning of freight by the vessel. When the loss or wreck of the vessel ends the service of a seaman before the end of the period contemplated in the agreement, the seaman is entitled to wages for the period of time actually served. The seaman shall be deemed a destitute seaman under section 11104 of this title. This subsection applies to a fishing or whaling vessel but not a yacht.

(c) When a seaman who has signed an agreement is discharged improperly before the beginning of the voyage or before one month's wages are earned, without the seaman's consent and without the seaman's fault justifying discharge, the seaman is entitled to receive from the master or owner, in addition to wages earned, one month's wages as compensation.

(d) A seaman is not entitled to wages for a period during which the seaman –

> **(1)** unlawfully failed to work when required, after the time fixed by the agreement for the seaman to begin work; or

(2) lawfully was imprisoned for an offense unless a court hearing the case otherwise directs.

(e) After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. A demand may not be made before the expiration of 5 days from the beginning of the voyage, not more than once in 5 days, and not more than once in the same port on the same entry. If a master does not comply with this subsection, the seaman is released from the agreement and is entitled to payment of all wages earned. Notwithstanding a release signed by a seaman under section 10312 of this title, a court having jurisdiction may set aside, for good cause shown, the release and take action that justice requires. This subsection does not apply to a fishing or whaling vessel or a yacht.

(f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.

(g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days wages for each day payment is delayed.

(h) Subsections (f) and (g) of this section do not apply to a fishing or whaling vessel or a yacht.

(i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

(Pub.L. 98-89, Aug. 26, 1983, 97 Stat. 566; Pub.L. 99-640, § 10(b)(4), Nov. 10, 1986, 100 Stat. 3550.)